

# DRBF Forum

Volume 18 Issue 4 December 2014/January 2015



## 2014 Chartered Institute of Arbitrators Dispute Board Rules

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King's College London,  
and Past President,  
DRBF Region 2 Board of  
Directors

“The scope of Dispute Boards is substantial and they could be established in a range of industries worldwide; for example, in the financial services industry, the maritime industry, operational and maintenance contracts and long-term concession projects.”

### Introduction

After careful consultation, the Chartered Institute of Arbitrators (CI Arb) produced and published in August 2014 a set of international commercial Dispute Board rules.<sup>1</sup> Although a variety of Dispute Board rules already existed, they only focused on the construction industry. In addition, some rules are drafted as an integral part of a standard form contract (for example, the FIDIC suite of contracts<sup>2</sup>) while others can be incorporated (for example, the ICC rules<sup>3</sup>). The new CI Arb rules can now be used on any medium- or long-term project, whether construction, IT, commercial or otherwise.

### Dispute Boards in Context

Dispute Boards (DBs) are created by contract and aid the parties in resolving their disagreements. In the last 20 years, there has been an increasing demand for

less adversarial dispute resolution methods, such as mediation, conciliation and Dispute Boards<sup>4</sup>. The scope of Dispute Boards is substantial and they could be established in a range of industries worldwide; for example, in the financial services industry, the maritime industry, operational and maintenance contracts and long-term concession projects.

Well-drafted Dispute Board rules will allow parties a flexible approach in resolving disagreements which may arise during the performance of their contract. However, it has to be acknowledged that a standing Dispute Board which remains in place for the duration of a contract is an additional expense for the parties. It is, therefore, likely that DBs will mainly be suitable for mid- to high-value projects because of the cost involved.

*(continued on page 8)*

NOTE: The author kindly acknowledges the Chartered Institute of Arbitrators for the reproduction of this article, which was originally used as a paper for the CI Arb DAS Conference held in London on the 14 November 2014. The author also acknowledges the research and kind assistance of Christina Lockwood and Reyhan Yilmaz, both of Fenwick Elliott LLP.

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## President's Page



**Paul Taggart**  
President  
DRBF Executive  
Board of Directors

Dear Members, Sponsors and Supporters,

Let me express my gratitude for the trust placed in permitting me the post of President of the DRBF Executive Board. It is a considerable honour, responsibility and challenge.

You will no doubt join me in expressing thanks to Graham Easton as Past President. Many of you will have met Graham as he has been a DRBF global ambassador, travelling and speaking extensively on dispute avoidance at regional and international conferences. In addition to that Graham has made a great contribution together with Past President, Roger Brown, to the overall DRBF management in policy matters.

The DRBF was initially established in 1996 by the founding group. As an organisation it distinguishes itself as the initiator of the Dispute Board and dispute avoidance system as we know it. No other organisation can boast ownership of that. Members of the DRBF have gone on to promote the DB dispute avoidance system in its many forms in collaborating with ConsensusDocs, FIDIC, the ICC and others. We have also spread geographically. From its initial roots in the USA, the DRBF now has no less than 42 Country Representatives all serving in the promotion of the system. Again no other organisation can boast that organisation and network. It is to the DRBF that others look as the forefathers and guardians of the system.

That legacy imparts a responsibility on me, as incoming President, to ensure continuity of our core principles and activities, i.e. the promotion of DB and dispute avoidance systems, provision of quality education and training in DBs and dispute avoidance, and the promotion of ethics in Dispute Board activities to sustain our organisation.

In 2015, communication with our members and outreach to owner and industry organisations will be the key to our success. We communicate primarily through the Forum newsletter, website, conferences and training workshops, and regional newsletters. Like last year, 2015 will be a busy year for the Foundation.

This coming year the DRBF will host the International Conference in Genoa (May) and the Annual Meeting and Conference in San Francisco (October), as well as Regional Conferences in Nairobi (February), Seattle (June), and Istanbul (November). There are also local Member's Meetings being developed by DRBF Representatives to bring members together for networking and to discuss issues relevant to their region.

Training will also feature heavily. This year has seen us play center stage in the training of potential DB members for service contracts for the 2016 Olympic and Paralympic Games in Brazil. Much has also been done in the way of informing owners, contractors and funding banks on the benefits of DBs and dispute avoidance. This is set to continue. Next year, our long-awaited international training programme will be completed. This will allow us to more easily spread valuable knowledge and experience further in the field. Webinar is also known as a useful training tool and we will study the viability of this in the coming year.

We cannot overlook the growing demands of the internet as a promotional tool. To that end we intend an update and reorganization of our website and improved library services. Part of that will be to include foreign language sections and cross-links to other approved DRBF websites. The internet age is very much upon us and offers exciting opportunities.

Finally, just whilst Graham and Roger were seeking a quiet retirement, I am pleased to announce that they have "volunteered" to guide an update of the Manual, with a special section on dispute avoidance. The next step will be to look at translation in Spanish, Portuguese



and Turkish, amongst others. We plan to roll out a revised membership level program in 2015, so there will be a lot of work to do on that front and I invite you to recruit new members in this coming year.

So as you can see a busy year ahead is expected!

Finally I am reminded that the Foundation is just that, a transparent not-for-profit organisation dedicated to our core activities and values. The lifeblood of the DRBF is its membership. May I ask the support of all members at all levels to aid us in the furtherance of our goals and your valued participation at our conferences, training sessions and development. Above all, volunteer! Your participation and contribution is invited! As President, I am here to help any member, old or new, to find a role to serve.

Once again my thanks and may I also offer my best wishes to you all in 2015.

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### Executive Board of Directors Meeting Schedule

January 19  
February 16  
March 16

Meeting notes from the Executive Board meetings are available to all members upon request.

The Board of Directors for each region also meet on a regular basis.

Questions or ideas for the Boards should be submitted to the Board President directly or to Ann McGough at [amcgough@drb.org](mailto:amcgough@drb.org).

## A Conversation with... Joe Sperry P.E.

**Joe Sperry, P.E.**  
DRBF Founder,  
Honorary Director,  
DRBF Executive Board of  
Directors, and  
recipient of the Al  
Mathews Award  
for Dispute Board  
Excellence (2002)

DRBF Founder Joe Sperry offers a brief look at his construction experience: During college I was a laborer for a small contractor; after college I was an inspector/resident engineer with the Pennsylvania Highway Department for three years. All my subsequent experience has been in tunnels: 11 years with a large, international contractor on five tunnel projects, then consulting—some 20 years for contractors, followed by some 20 years for owners and engineers, then mainly Dispute Boards since 2002. I have served on 34 DBs, 13 as Chair.

**Q** How and when did you get your first Dispute Board appointment?

**A** In 1982 the Washington Department of Transportation interviewed three tunnel guys for the Mt Baker Ridge Tunnel DB. Since the early 1970s, I had been active on committees looking for a solution to the disputes problems that plagued tunnel contracts; with this background I knew all the answers and got the job.

**Q** What is the most difficult situation you have ever had to deal with on a DB?

**A** When a member favors, however subtly, one of the parties. This has happened on over 25% of the DBs on which I have served. The contractor is usually the favored party; owners do not adequately vet the contractor's nominee.

In this situation, if disputes arise the DB recommendation often tilts, albeit sometimes only slightly, to the contractor. A slight tilt can make the ensuing settlement negotiations between the parties much more difficult. When all the Board members are impartial, the recommendation is easier and faster to agree on and to write. It is also easier for the parties to understand and accept and to then settle the dispute.

**Q** What is the most satisfying DB you have served on and why?

**A** Many years ago our DB uncovered facts,

of which neither party was aware, that eventually convinced the owner to return a large retention to the contractor. This dispute concerned work that interfaced with an adjacent contractor who had not been forthcoming and honest with the owner concerning his coordination and construction at the interface of the contracts. We smelled a rat and persisted with several post-hearing requests for additional documentation. After a conference call with the parties to obtain still more information, the truth was finally apparent. We submitted a draft of factual findings to the parties for review and comment. This all took awhile; our recommendation, including five appendices, was submitted almost three months after the hearing. We found that the contractor was liable for some \$4,000 for modifications at the interface and was entitled to interest for 20 months on \$700,000 that had wrongly been retained by the owner. It was a huge win for the DB process. I shudder to think what might have happened to the contractor in arbitration or litigation—the usual venues for construction disputes before DBs.

**Q** What is your greatest regret with respect to the DBs on which you have served?

**A** During a DB get-acquainted breakfast, the contractor's member stated that he was partial to the contractor and would always recommend for the contractor; he would not change his view. I have always regretted not bringing that up for discussion at the first meeting.

**Q** Should the DRBF recommend (max. and min.) age limits for DB members?

**A** No, this should be completely up to the individual. Responsible professionals will stop accepting DB assignments when they realize they are losing their sharps..

**Q** How many DBs can a member properly serve on at any one time?

**A** It is up to each member, their individual circumstances and the circumstances of the



DBs they are on. My policy has been to limit myself to four Boards, as serving on more interfered with my other consulting work. However, I was on six once when there was a lot of local tunnel work.

Keep in mind that a major aspect of the quarterly DB meetings is establishing rapport, mainly with the parties, but also with your fellow DB members. Rapport comes with remembering faces and your previous introductions and discussions. You can't do this effectively if you're on too many DBs.

**Q** If you could change one aspect of the procedures under which DBs usually operate, what would it be?

**A** Require the parties to always submit Common Reference Documents to the DB before every hearing. The parties to the last four disputes I've heard submitted what they called CRDs, but there was nothing "common" about them—they submitted only the documents needed to make their case.

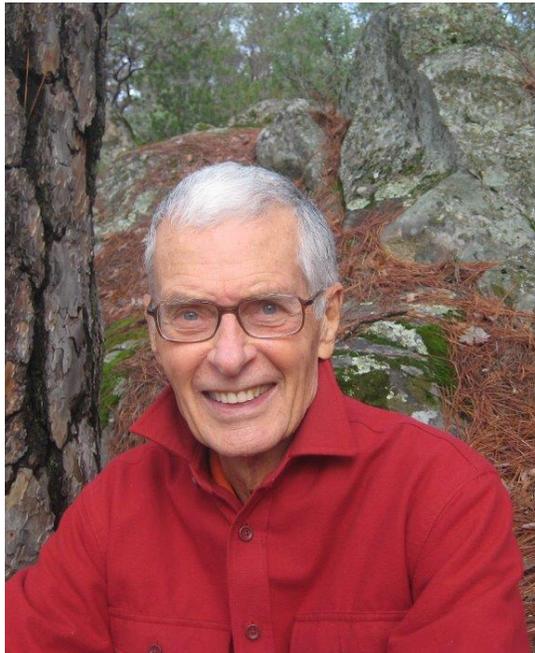
Preparation of the CRD is helpful to the parties—they both understand the other party's position better and thus can better articulate their own position. They also can offer more meaningful rebuttal.

A properly prepared CRD is most important to the DB, to understand each party's position when reviewing in preparation for the hearing, to follow the testimony, to ask questions during the hearing, and to prepare the report.

I recently estimated that a proper CRD would have saved the parties some 25% of both their document preparation costs and their DB costs for the dispute.

**Q** What advice would you give to younger members keen to obtain their first DB appointment?

**A** Read the *DRBF Practice and Procedures Manual*, join the Dispute Resolution Board Foundation, take DB trainings, and attend our Annual Meetings whenever possible.



sible. Tell your industry contacts and owners and contractors of your interest and availability. Respond to published solicitations for DB members.

**Q** How do you keep fit and healthy and what is your preferred relaxation away from DBs?

**A** My wife, Shirley, and I stretch and exercise together almost every day. In addition we both garden and I like to cut brush and trim trees—we live in a forest in the fire zone in Northern California. I read a lot and like to follow political, economic and financial news—not sure that's "relaxation."

**Q** Outside your own country, where would you most like to live and why?

**A** It's hard to imagine leaving our home in the woods. If forced to do so, Shirley suggests that we ask Romano Allione if they have a guest house at Camogli that we could rent while we consider what to do next

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The Forum welcomes articles on all aspects of Dispute Resolution Boards, and members are encouraged to submit articles or topics to the DRBF, attn: Editor.

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# Ethics in Today's World of DRBs

## Ethics Panel Discussion at the DRBF Annual Meeting and Conference in Toronto: Continuing Discussion of the Ethic Panel's Questions



**Jim Phillips Ph.D.**  
Chair  
DRBF Ethics  
Committee

As I was drafting the title of this article, I started to use the terms “final discussion” but realized that our discussions at conferences and the discussions in this column are ongoing ones, in that we all, in my opinion, should be constantly open to revisit the discussion of ethical issues and seek out our colleagues for feedback and insight when we are faced with an ethical dilemma.

Several years ago at our annual meeting in Houston, Texas, I introduced a model of one approach to ethical decision-making. At its center was the practice of seeking feedback and insights from colleagues and trusted coworkers. The premise being ethical decision-making is best done in the light of day with the guidance and ideas of others. Those decisions made alone and not discussed with anyone are often not the best we could make.

Moving on to the Toronto conference, Roger Brown introduced a question of a DRB chair sitting as the Chair on several projects for the same owner, and on a difficult project behind schedule, the Chair engages in ex parte discussions with both principals from both parties between monthly meetings with everyone's knowledge. Moreover, the full Board and the principals meet before DRB meetings and reach decisions on issues that are then announced at the meeting.

My first comment is that Canon 2 of the DRBF Code of Ethics states that ex parte communications between the Board and either party should not occur. Whether the fact that all parties have knowledge that these communications are ongoing operates to mitigate its effect is an open question. My preference is that these types of communications be avoided completely.

On first review, this practice as described

in Roger's issue looks expedient and effective, in part because, as I read it, everyone knows about the ex parte discussions and the between-regular-meeting meetings. Also, I would add that any analysis has to take into consideration the terms of the operating procedures adopted at the Board's installation on the project. If these practices were agreed to at the time of the DRB's inception, I would have to conclude that these procedures appear to look consistent with DRBF Canons of Ethics except for the ex parte communications discussed above.

However, as the question suggests, there may be dangers lurking ahead. One would be in the event the decisions under these practices are not satisfactory to the contractor, there could be a claim of bias, partiality and impropriety by the DRB toward the owner, since it could be argued that the DRB is the owner's DRB. Another potential issue is the absence of DRB recommendations, as it appears that this is a negotiation process and not a dispute resolution process.

The reason that this may be an issue is, depending on the contract specifications and the relevant legal statute, either or both parties may be jeopardizing their rights to an administrative process in an appeal of the DRB's recommendations. Some might argue that it is a very positive outcome if there are no disputes to resolve during the course of the project and that all issues are resolved by negotiation. One problem here would be if an issue arose late in project, the facts suggest the project is behind schedule, that impacted the critical path and one of the parties realized that they had negotiated away their contractual rights, a friendly DRB could transform into a heated battle.

Roger does not reveal whether there was a



record kept of all the negotiations and agreements, and if there was, at least there would be a record of the issues and how they were resolved. So, again, at first glance, this practice looks expedient and practical, but at the same time, dangers may lurk ahead.

I will address the ethics questions addressed by Bob Rubin and Chris Miers in the next issue of the *Forum*. If a reader has an opinion about my comments above, please feel free to email me.

## ETHICS: FOR NEXT TIME

Assume you are a newly minted engineer with a P.E. but no practical experience. Also assume that you have heard about the DB process and would like to participate on a Board in your area. You contact the Dispute Resolution Board Foundation and discover that typically the Foundation recommends that you have training in DB practices be-

fore you serve as a Board member. You do not wish to wait for the next training and decide to call your old friend who is the owner of ABC Construction Co. You explain the situation and request that he “have you appointed to the next DRB” his company has on one of its projects.

Sure enough, this owner calls his Board member recently selected to sit on a DRB as the owner’s selection and lobbies heavily that you be appointed Chair. You even offer to pay this owner a third of all the fees you will be paid on the project. The owner agrees, and through intense lobbying, gets you appointed Chair.

Prior to the first meeting of the DRB you are asked to disclose any relationships that may affect your impartiality.

## What should you do?

### Ethics Commentary or Question?

Please contact:

Jim Phillips, Chair, DRBF Ethics Committee  
P: +1-804-289-8192 E: [jphillip@richmond.edu](mailto:jphillip@richmond.edu)

## Forum Newsletter Editorial Deadline

Our readers love to hear DRB success stories, challenges facing the process, and the latest industry news and events.

If you have new information about DRBs, DRBF members, or an article to share, please tell us! Contact Forum Editor Ann McGough by email at [amcgough@drb.org](mailto:amcgough@drb.org)

Deadline for the next issue:  
**February 28, 2015**

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*(continued from page 1)*

The cost of litigation and arbitration can be extremely high and, at the end of the process, the prevailing party may realise that it spent far more to win the dispute than the issue in dispute was ever worth. The applicable courts and arbitral tribunals are often unable to facilitate the rapid resolution of an international commercial dispute that can be crucial, particularly in a long-term contract where maintaining a commercial relationship is very important.

### **Comparison of Published Dispute Board Rules**

Prior to the new CI Arb rules, there was no single set of international Dispute Board rules that could be used on a wide range of commercial projects. For example, the ICC Rules are the closest but they focused on the construction industry, and the FIDIC DAB procedure is woven into the fabric of the FIDIC contract. Extracting the rules required very careful drafting and the issues posed by enforcing a DB's decision under the FIDIC contract are wide-ranging. The new CI Arb rules offer a more simplistic and straightforward approach to avoid those issues and the rules can be implemented in any commercial or construction contract by the incorporation of a short precedent DB clause. The different types of Dispute Boards are examined below.

**FIDIC:** The World Bank and a number

of other multilateral development banks (MDBs) have for many years adopted the FIDIC Conditions of Contract for Construction 1st edition 1999 as part of their standard bidding documents, which their borrowers or aid recipients had to follow, but they included additional clauses which were specific to and varied between the MDBs. This created inefficiencies and uncertainties amongst the users of the documents. The MDBs recognised this and resolved to harmonise their tender documents on an international basis.

FIDIC and the MDBs embarked upon a process to harmonise their DB provisions, and produced a special MDB harmonised edition of FIDIC 1999 Conditions of Contract for Construction for MDB-financed contracts, which was released in May 2005<sup>5</sup> ("the MDB Harmonised Construction Contract"). The third amended version of the MDB Harmonised Construction Contract was published by FIDIC in June 2010<sup>6</sup>, which is the standard set of contract conditions adopted by the leading development banks.

In both FIDIC and the new CI Arb rules, the parties have to appoint either one sole DB member or three DB members by the date stated in the Appendix to Tender/Contract.

Where the contract is silent on the date that the DB members should be ap-

<sup>1</sup> CI Arb Dispute Board Rules, August 2014, <http://www.ciarb.org/das/Dispute%20Board%20Rules.pdf>

<sup>2</sup> FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (Red Book), First Edition 1999

<sup>3</sup> ICC Dispute Board Rules; <http://www.iccwbo.org/products-and-services/arbitration-and-adr/dispute-boards/dispute-board-rules/>

<sup>4</sup> [http://www.fenwickelliott.com/files/dispute\\_board\\_rules\\_-\\_consultation\\_14\\_oct\\_2013\\_2\\_.pdf](http://www.fenwickelliott.com/files/dispute_board_rules_-_consultation_14_oct_2013_2_.pdf)

<sup>5</sup> General Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, Multilateral Development Bank Harmonised Edition May 2005, <http://fidic.org>

<sup>6</sup> General Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, Multilateral Development Bank Harmonised Edition June 2010, <http://fidic.org>



pointed by, the CIArb rules provide that a member must be appointed within 28 days. There is no such provision under the FIDIC rules.

The appointment of DB members must be made jointly under the FIDIC rules, whereas under the CIArb rules, the appointment is only made jointly by the parties if they are appointing a sole DB member. On the other hand, if the parties are appointing three DB members, then the CIArb rules provide that each party must nominate one DB member each. The two appointed DB members must then appoint the third DB member as chair, subject to the approval of the parties. This can be contrasted with FIDIC where the parties must also select the third DB member (but only if they have agreed to have three DB members instead of one sole member).

FIDIC clause 20.4 deals with the referral of a dispute to the DAB and the binding nature of the DAB's decision.

When referring a dispute to a DB, the difference between FIDIC and CIArb is that in FIDIC, the precondition for referring a dispute to the DB is that: (1) there must be a dispute (of any kind whatsoever), and (2) the referring party must notify the other party and engineer and provide them with copies of the referral.

The precondition in the CIArb rules is that the parties must comply with any contractual pre-review requirements or prior dispute resolution process as provided for by the contract, as applicable. If this requirement has been met, the parties can also (as in the case of FIDIC), at any time, give notice of its intention to refer the dispute to a DB by submitting a

position statement to the other party and to the DB.

Under both FIDIC and the CIArb rules, the DB must give its decision together with its reasoning within 84 days of receiving the referral/position statement.

However, the difference between the rules is that in FIDIC, as there can only be a DAB as a type of DB, the parties must promptly give effect to the DABs. Therefore, the DAB's decision under a FIDIC contract is temporarily binding, and becomes final and binding in the absence of a valid notice of dissatisfaction which must be given by either party within 28 days of receiving the decision. This can be distinguished from the CIArb rules where, in addition to a DAB type of dispute board, the parties also have the choice of choosing a DRB as a type of dispute board where you can voluntarily comply with a Recommendation which you are not bound by.

ICC: Under the ICC Dispute Board Rules (the "ICC Rules"), the parties can choose to implement three types of Dispute Board procedures: DAB, DRB and a third type of Dispute Board, Combined Dispute Board (CDB), which was developed by the International Chamber of Commerce (ICC). CDBs are useful for those parties who cannot decide if they need a DRB or a DAB. However, a CDB can create some uncertainty. When CDBs issue recommendations with respect to disputes, they may instead issue a temporarily binding decision if one party requests this and no other party objects. The decision must be implemented immediately. If one party objects to issuing a binding decision, this leads to a period of uncertainty as the CDB then has to de-

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decide whether to issue a recommendation or decision. Due to the possible confusion that can be caused by this path, the new CIArb rules have not adopted CDB as a Dispute Board that can be chosen by the parties.

Both the ICC rules and CIArb rules provide that the DB shall comprise either one or three members, but if the parties have not agreed on the number of DB members, the DB shall be comprised of three members.

If the DB is to comprise of three persons, both the ICC rules and CIArb rules state that the third DB member is to be appointed by the two appointed DB members to select the third DB member as a chairman subject to the approval of the parties.

The parties are restricted by the time in which they must appoint a DB member under the ICC rules, which must be within 30 days, whereas this can be longer under the CIArb rules provided that you have specified the date in the contract.

The method of referring a dispute to the DB is very similar under both the ICC rules and CIArb rules. The only real difference is the time frame in which the other party must submit their response by (30 days under the ICC rules and 28 days under the CIArb rules). However, under the CIArb rules, the referring party may also reply to the response within 14 days of receiving it (subject to obtaining the permission of the DB).

Unlike the CIArb rules, parties do not have to comply with any contractual pre-view requirements before referring a dispute to DB, and the DB has a slightly lon-

ger period within which they must make their determination by (i.e. 90 days of the statement of case being received as opposed to 84 days under the CIArb rules).

INSTITUTE OF CIVIL ENGINEERS (ICE): The ICE Dispute Resolution Board procedure was issued in February 2005. The rules consist of two alternatives: Alternative One for use on international projects and UK contracts which are not subject to the provisions of the HGCRA, and Alternative Two which is HGCRA compliant.<sup>7</sup>

This differs from the CIArb rules which implement one set of international commercial Dispute Board rules that can be used on any project.

The procedure also contains a model tripartite agreement to be entered by the contractor, employer and DB member. Each DB member will enter into a separate agreement. The parties can agree on the identity of the Dispute Board member if there is to be only one Board member.

If there are to be three, each party may nominate one member for approval by the other party. The parties shall then consult both members and agree upon the third member, who shall be the Chair. This leaves the traditional arbitration procedures in the contract intact (in the case of Alternative One). This is similar to the CIArb rules with the exception that it is the DB members who select the third member (with the approval of the parties) and not the parties.

The other difference is that the ICE rules provide that the appointment of the DB members must be made within 56 days from the date of the contract.



If the parties fail to establish a DB, the CIArb shall, after consulting the parties, appoint the DB member or members within 28 days of the written request of one of the parties. On the other hand, the ICE will appoint the DB member or members within 14 days of the written request of one of the parties and is not under an obligation to consult any of the parties when doing so.

Unlike the CIArb rules, parties under an ICE agreement do not have to comply with any contractual pre-review requirements before referring a dispute to the DB. Either party may at any time give notice of its intention to refer a dispute to the DB and must provide copies to the other party.

Under both the ICE rules and CIArb rules, the DB must give its decision with its reasoning within 84 days of receiving the referral/position statement.

AMERICAN ARBITRATION ASSOCIATION (AAA): The AAA Dispute Resolution Board Guide Specification<sup>8</sup> provides for an independent DRB that ‘will assist in and facilitate the timely resolution of disputes ...’ The focus of the AAA procedure is on party autonomy.<sup>9</sup> Therefore, there is only one type of dispute resolution platform, the DRB, which can be implemented, unlike the CIArb rules which offers the option to choose a DRB or DAB. The DRB will assist the parties to resolve their differences. It will not make a binding decision, but will issue written non-binding recommendations.

The AAA will help the parties to identify the members of the DRB, but will not appoint them in default. However, the appointment of DRB members can be viewed as being limited as it can only be made from the list of individuals provided by the AAA, unlike the CIArb rules. Also, the DRB must consist of three members and the parties do not have the option for the DRB to consist of a sole Dispute Board member.

There is also a restricted period in which the DB members must be appointed by (i.e. 14 days from the date of the contract), and unlike the CIArb rules, there is no provision for when the appointment must be made by if the contract is silent on the date.

Both the AAA rules and CIArb rules are similar in that contractual pre-review requirements must be met before parties can refer a dispute to the DB.

The DB’s recommendations in writing is due within 14 days of hearings, unless the parties agree for this time to be extended. Unlike the CIArb rules, the AAA rules do not specify whether the DB must give reasons for the determination, but either party may request clarification if it does not understand the recommendation, and also request the DB to reconsider if new information becomes available.

Under the CIArb rules, if a party rejects a recommendation they may submit the dispute to arbitration, or if the parties agree, to the courts. The AAA rules on

<sup>7</sup> ICE Dispute Board Procedure, Institution of Civil Engineers; <http://www.ice.org.uk/getattachment/c55bd400-4b50-463d-a836-a266d3315691/ICE-Dispute-Board-Procedure.aspx>

<sup>8</sup> AAA Dispute Resolution Board Guide Specification; [https://www.adr.org/aaa/faces/services/disputeavoidanceservices/disputeresolutionboards?\\_afLoop=381718472279925&\\_afWindowMode=0&\\_afWindowId=null#%40%3F\\_afWindowId%3Dnull%26\\_afLoop%3D381718472279925%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3D12bmtcv6g\\_181](https://www.adr.org/aaa/faces/services/disputeavoidanceservices/disputeresolutionboards?_afLoop=381718472279925&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D381718472279925%26_afWindowMode%3D0%26_adf.ctrl-state%3D12bmtcv6g_181)

<sup>9</sup> Establishing Dispute Boards – Selecting, Nominating and Appointing Board Members, Nicholas Gould, Society of Construction Law, December 2006.



the other hand do not specify what can be referred to arbitration or court proceedings.

The AAA rules do not allow the parties to obtain the advice or informal opinions of the DB members whereas the CI Arb rules do make a provision for this provided that the advice and/or opinion is obtained jointly.

The new CI Arb rules are considered in more detail below.

### **Appointing Dispute Board Members**

A DB should ideally be established at the outset of a contract (at or around the time of the commencement of the works on site) and remain in place throughout the project duration. This enables DB members to become familiar with the contract and its performance, and also be acquainted with the parties, making the DB an effective dispute resolution mechanism with “real-time” value.

The provisions requiring the establishment of a DB must be contained in the contract between the parties. The process of establishing a DB is challenging. Identifying, agreeing upon and appointing individuals with the appropriate skills and experience can be time-consuming. It is recommended that the parties co-ordinate their selection of DB members and chairperson in a way so as to provide the maximum of appropriate skills for the project that is relevant to the circumstances, including the availability of the DB member for the duration of the project.

The contract between the parties should state whether the DB will comprise of one or three members. If the contract

is silent on this, or if the parties do not agree, then there shall be three members on the DB.

If the parties agree to have a sole DB member, they must appoint the member by the date stated in the contract or within 28 days of the contract if the contract is silent on the date.

If, on the other hand, the parties wish to appoint three DB members, then each party nominates one member for the approval of the other party. The third member is then selected by the two members (subject to approval by the parties) who will act as chairperson. As before, the three members must be established by the date stated in the contract or within 28 days of the contract if the contract is silent.

One party cannot terminate the appointment of a DB member unilaterally. The appointment can only be terminated by the agreement of both parties and a new DB member must be appointed in the same way as the replaced member was required to have been appointed.

If there is a conflict of interest, or if a DB member fails to comply with the Tripartite Agreement, either party can apply to the CI Arb, at any time, to remove the DB member in question. The CI Arb also has the power to appoint a DB member if the parties fail to do so in the manner set out above.

### **DB Member’s Obligations and Ethics**

The DB members must treat all information provided to them during the course of their service as confidential or, if they have to disclose the information, this must only be for the purpose of avoiding



or settling a dispute unless they have the consent of the parties or a right by law.

The DB members are also under an obligation to adhere to the ethical obligations set out in the rules or in the Tripartite Agreement.

The DB member, and any subsequently appointed replacement DB members, must be impartial and independent at all times and confirm that there is no conflict of interest. In the event that there is a conflict, the member must disclose it to the parties immediately. If the parties wish to express an objection with regard to that member, they must do so within 21 days otherwise they will be deemed to have waived any potential conflict of interest.

Deriving from the principle that no person can be his or her own judge, the following situations preclude a person from serving as DB member:

1. There is an identity between a party and the prospective member, or the prospective member is a legal representative of one of the parties.
2. The prospective member is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the parties.
3. The prospective member has a significant financial or personal interest in one of the parties or in the matter at stake.
4. The prospective member regularly advises one of the parties or an affiliate of one of the parties, and the prospective member or his or her firm derives a significant financial income therefrom.
5. The situations listed in this clause are non-exhaustive examples of specific situations which give rise to justifi-

able doubts as to a person's impartiality and independence. Disclosure of any of these situations cannot cure the objective conflict of interest.

### **Referring a Dispute**

If there is a dispute, the first thing that parties must do is comply with any contractual pre-review requirements or prior dispute resolution process which may be required under the contract.

In circumstances where a dispute arises, either party can, at any time, give notice of its intention to refer the dispute to the DB by submitting a Position Statement to the other party and to the DB. The referring party must include in the Position Statement a summary of the dispute, a list of the issues and their position together with the redress sought. This must be submitted with any supporting evidence.

Following the submission of a Position Statement, the responding party must submit a response within 28 days of receiving the Position Statement. The response must include a summary of their position, supporting evidence and a statement of what they request the DB to determine.

The referring party may, with the DB's permission, reply to the response within 14 days of receiving it.

Throughout this process, the parties are still free to settle the dispute at any time, with or without the DB's assistance.

### **Enforcing a Decision**

The DB's decision must be made within 84 days of the DB receiving the Position Statement.

The parties are only contractually bound



by the DB's decision if they have chosen to implement a DAB. If, on the other hand, the parties chose to implement a DRB they would not be bound by it as it would only be a Recommendation as opposed to a Decision.

If a DRB issues a Recommendation, each party must either accept or reject the recommendation within 21 days. After the 21 days, either party can either voluntarily comply with the Recommendation or submit the dispute to arbitration, or if the parties agree, the courts.

The recommendations made by the DRB are admissible in subsequent arbitral or judicial proceedings.

### **The Structure of the Dispute Board Rules**

The CI Arb rules are written in a way which, unlike the rules under FIDIC, allows it to be implemented in contracts in any industry and not just construction. It has one set of rules for DABs and one set of rules for DRBs, thereby giving the parties the choice of obtaining a non-binding Recommendation or a binding Decision and is, therefore, not restrictive (like FIDIC which only uses DABs) or uncertain (like the ICC which offers three different types of Dispute Boards).

The rules also offer clarity. For example, the rules in AAA and ICE do not specify what can be referred to arbitration or court proceedings, whereas this is clearly set out in the CI Arb rules.

The CI Arb rules also create certainty in that it specifies when a DB member must be appointed if the contract between the party is silent on the date. By contrast, the AAA and FIDIC rules do not make

any provision in circumstances where there is no date specified in the contracts regarding the appointment of DB members.

Furthermore, the purpose of the CI Arb rules is to assist the parties as much as possible in order to avoid disputes, which, in turn, enable parties to focus on the delivery of the project. The CI Arb rules do this by allowing parties to jointly obtain the informal advice of DB members without having to refer a dispute, which can be contrasted with the rules under the AAA.

### **Conclusion**

Due to the recent introduction of the new CI Arb rules, it is difficult to tell at this stage how successful it will be in terms of its implementation in international contracts. However, what is certain is that it can be used in any commercial contract and is not specific to a particular industry. Therefore, parties to the contract do not have to query whether the rules will work for their bespoke contracts nor will they have to be concerned with any rigid rules or areas of uncertainty as the rules offer two types of Dispute Boards, whilst, at the same time, avoiding confusion by not offering a combined dispute board which can hinder parties' ability to decide on the suitability of a Dispute Board.

***Nicholas Gould** is a dual-qualified chartered surveyor and solicitor advocate specialising in construction and engineering law. He acts mostly in relation to international construction disputes involved in resolution by mediation, Dispute Boards, international arbitration and litigation. He can be reached at [ngould@fenwickelliott.com](mailto:ngould@fenwickelliott.com).*



## **DRBF Regional Conference & Workshop**

### **Real-time Dispute Avoidance & Resolution for Construction Projects**

**26-27 February 2015 • Nairobi, Kenya**

Following on from successful conferences held in South Africa in 2008 and 2014, the workshop and conference will cover the historical perspective on dispute resolution in East Africa and offer guidance on successfully establishing and operating a Dispute Board. International and local industry DB users and practitioners will share their perspective with owners and DB practitioners working in the region. The first day offers a workshop for introductory or advanced users and Dispute Board practitioners, and Day 2 will deal in some depth with the dispute avoidance role of DBs and DB procedures in practice.

#### **Event Details:**

##### **February 26: Workshops**

- Introductory Track - Learn why and how to effectively implement a Dispute Board for complex projects.
- Advanced Track - Overview of best practices in Dispute Board implementation and interactive exercises.

##### **February 27: Conference**

- Dispute avoidance and resolution in East Africa; case studies and future opportunities.
- Enforcement of decisions, Dispute Board implementation in a Statutory Adjudication environment, and Dispute Board use on Public Private Partnership projects.

**Register today at [www.drb.org](http://www.drb.org)**

## Olympic Performance: Teamwork Brings DB Training to Brazil for New Program



**Christopher Miers**  
President  
DRBF Region 2  
Board of Directors

How do you prepare 70 people for the Olympics in the space of two months? Well, in October the DRBF was asked to train and prepare Dispute Board Members and Chairs in Brazil and had to have the lists complete by mid-December.

This was a joint initiative brought together by DRBF member Jerry Brodsky of Peckar & Abramson, and organised by Jerry, DRBF Region 2 President Chris Miers, and Victor Madeira of MVA Advogados, and with support from Julio Bueno of Pinheiro Neto, and Fernando Marcondes of L.O. Baptista.

The initiative required the DRBF to put in place a Brazilian panel of potential Dispute Board members. Panel members are needed to serve on three-person and one-person standing Dispute Boards which are to be engaged on 35 projects for non-permanent structures in preparation for the Olympic and Paralympic games in 2016.

These projects are all to be run on short periods of typically 6-9 months, and of course they have little capacity to accommodate delays to completion. This produces specific requirements for all aspects of the setting up and operation of the Dispute Board, whereby all normal processes of operation have to be conducted in much shorter, tighter timeframes.

The core of the training was to prepare a three-day intensive, interactive workshop designed for experienced engineers and lawyers who had no prior experience sitting on Dispute Boards. All members needed to speak Portuguese, and this was to ensure a strongly Brazilian focus which is considered essential for the effectiveness of Dispute Board on these projects.

For the Chairs, a separate one-day session was prepared, and Chairs were all selected with a requirement that they already had extensive experience either via serving on Dispute Boards or on similar dispute avoidance and resolution panels.

DRBF Region 2 was able to develop its four-day training kit to provide the training material. This had already been substantially prepared by our Chair of International Training Simon Fegen, and Region 2 Director Mark Entwistle, with earlier support from a wide team of DRBF members. However, substantial further work was needed which Simon and Mark achieved in record time. Mind you, we had not anticipated using the new training kit for the first time in Portuguese!

Alongside this, special Dispute Board rules had to be drafted for the exceptional circumstances for which these Dispute Boards are required in Brazil. This was done on the basis of amendments made to the ConsensusDocs rules, with agreement and support from ConsensusDocs.

The DRBF introduced a pre-selection process for candidates, requiring applicants to demonstrate an extensive background of relevant experience, as well as required language skills. Applicants registered online, providing requested details of project experience and qualifications. These applications were all then vetted by a panel of three DRBF members prior to acceptance onto the training course. This itself proved a substantial task, but the matter was expertly organised by our general manager, Ann McGough, both in setting up the website and thereafter in managing the process of receiving and vetting the applications. Not least, Ann successfully managed the three key organisers, Jerry, Chris and Victor!

The first rounds of training are concluded and the lists are being finalised. Projects commence in 2015, and the DRBF will have a continuing role in the management of the DB process throughout 2015. The DRBF also welcomes approximately 70 new members to the DRBF from Brazil.

*Christopher Miers can be reached by email at [cmiers@probyn-miers.com](mailto:cmiers@probyn-miers.com)*

## Stay Granted by UK Court - DAB Proceeds Despite Dispute Adjudication Agreement Incomplete and Not Signed

Clause 20 of the FIDIC Conditions of Contract is given support by the Technology and Construction Court (TCC) in the UK in a decision rendered in *Peterborough City Council (PCC) – and – Enterprise Managed Services Ltd (EMS) [2014] EWHC 3193 (TCC)* decided on 10 October 2014.

PCC, as employer, and EMS, as contractor, entered into a contract dated 7 July 2011 wherein EMS agreed to design, supply, install, test and commission a 1.5 MW solar energy plant on the roof of a building owned by PCC.

The form of the contract was a 1999 FIDIC EPC/Turnkey Project with the usual DRB provisions including, if necessary, jurisdiction of the UK courts in lieu of arbitration.

On 11 August 2014, PCC issued proceedings in respect of a dispute arising out of PCC's assessment of liquidated damages for late construction of the plant. On 26 August 2014, EMS applied to the nominating body named in the contract for the appointment of an adjudicator and John Wright was duly appointed.

He submitted his proposed fee for a daily rate without comment from either party but no Dispute Adjudication Agreement (DAA) was signed by anyone despite the form being an Appendix to the General Conditions.

On 27 August 2014 EMS issued its application seeking to stay the action brought by PCC. In this rare opportunity taken for judicial review, Justice Edwards-Stewart engaged in a thorough analysis of key aspects of the DAB provisions at Clause 20 of the FIDIC General Conditions of Contract, in particular, for EPC/Turnkey Projects as well as Plant and Design-Build.

The principal issue on the application is whether or not the contract requires, as a condition precedent to any action in the courts,

that any dispute be referred to adjudication by a DAB. If it does, then the question arises as to whether or not the Court should order the action to be stayed.

PCC's chief argument was that sub-clause 20.8 was in effect an opt-out that enabled party to refer a matter directly to the Court, relying principally on 20.8.1 which provided that where "there is no DAB in place, whether by reason of the expiration of the DAB's appointment or otherwise...the dispute may be referred directly to the courts of England and Wales..."

After discussing the provisions in Clause 20, the Court dismissed PCC's proposition that sub-clause 20.8 was in effect an opt-out clause concluding that 20.2.1 contains a mandatory requirement to refer disputes in the first instance to adjudication in accordance with sub-clause 20.4.

EMS relied on the FIDIC Contract Guide which states: "Sub-Clause 20.3 should resolve any failure to agree the membership of the DAB. The parties should thus comply with Sub-Clauses 20.2 and 20.3 before invoking Sub-Clause 20.8."

The Court reasoned that the source of the DAB's authority was the DAA, and "it is clear that, in the absence of any agreement to the contrary, the [DAA] is to be in the form set out in the Appendix to the Conditions (because that document is incorporated by reference into the DAA)."

Further, the Court concluded "the only missing ingredient, the rate of the adjudicator's daily fee is one that can be readily assessed by the court in default of agreement...the adjudicator put his proposals... neither party challenge them. I doubt if the court would have much difficulty in concluding that the figures he proposed were reasonable..."

*(continued on page 19)*



**John Madden**

## DRBF Annual Meeting & Conference in Toronto



**Ferdie Fourie,**  
Committee  
Chair, welcomes  
delegates to  
the 18th Annual  
Meeting and  
Conference

During October 23-25, 2014 the 18th Annual DRBF Meeting and Conference was held at the Sheraton Centre Hotel, Toronto, Canada. It was the first time the meeting and conference was held outside the United States. It was a great success.

The event focused on the use of Dispute Boards on complex projects and emphasized the power of dispute avoidance and real-time resolution. Contractors, owners, legal representatives, consultants and other construction professionals, familiar with or wishing to gain more knowledge of the Dispute Board process, attended. The conference not only covered Dispute Board best practices and techniques, but also dealt with contract provisions to implement a DRB and encourage resolution to avoid dispute.

Mr. Bob Rae, the keynote speaker, served eleven times in the House of Commons and was Ontario's 21st Premier. He said that the Dispute Board process is beyond mediation and arbitration. It is a commercial process that delivers positive results. He reminded the audience of the fact that conflict is natural and that it should be discussed. The most common mistake in communication is the assumption that it happened. Treat people with respect and build trust. Never be afraid of the facts and never ask what the other

cannot do. That is exactly what the DRB process encourages and why it succeeds.

A record number of people attended. In addition to Canada and the United States, delegates represented the United Kingdom, Italy, South Africa, Australia, Cayman Islands, Belgium, Romania, Malaysia, Germany and more. The Dispute Board process has emerged as a highly effective means of avoiding and resolving disputes for major construction and commercial projects, as well as improving outcomes in terms of delivery time and costs. The conference attendees shared their practical experience and made an in-depth analysis of this evolving dispute resolution process. With an emphasis on the DRB's unique role in dispute avoidance as well as resolution, conference delegates explored ethical and legal issues, lessons learned from existing DRB programs, and future expansion of the process. Delegates engaged in interactive discussions that deepened understanding of the successful implementation and use of Dispute Boards.

The topics and speakers were diverse, interesting and interactive. They covered topics from the traditional overview of the dispute review process, with emphasis on Canada, to the changing and challenging role of at-



Networking and socializing during the breaks is always a popular component of the DRBF conferences.



torneys in the Dispute Board process, to debating the question, “Promoting integrity: can DRBs assist in preventing fraud and corruption?”

Conference delegates, speakers, and guests visited one of Toronto’s finest restaurants for the Al Mathews Awards Dinner. On top of the famous CN Tower they enjoyed breathtaking revolving views of the city of Toronto and Lake Ontario more than 1,000 feet below. In addition to an optional tour of a Metrolinx tunnel project, delegates and their families could visit numerous popular attractions within the Toronto area, including Niagara Falls.

The Dispute Resolution Board Foundation’s 18th Annual Meeting and Conference and Training Workshops were great successes. It helped to advance the process around the globe leading to more time-efficient and

economic projects. The meetings encouraged ethics and will help to build better relations between the parties involved with a project.

Ferdi Fourie  
Conference Chair



Bob Rae, former Premier of the Ontario Legislature (1978-2013) gives an enthusiastic keynote address.

*(continued from page 13)*

In every case where Sub-Clause 20.2 or 20.3 applies there will be, at least temporarily, in existence a dispute but no DAB. The Court found that it was quite clear from the words “final and conclusive” in Sub-Clause 20.3 that the process of appointment is complete once the nominating body has “appointed” the adjudicator, and from that point on, a dispute can be referred to it.

In determining whether a stay should be granted, recognizing such as an exercise of judicial discretion, and considering what might be a “rough and ready” process of adjudication, but recognizing that the disputes of timeliness were foreseeable, considering issues of judicial economy, and finding the positions of the parties “quite finely balanced and...perhaps tipped in [PCC’s] favor”, the deciding factor was that there is a presumption in favor of leaving the parties to resolve their disputes in the manner provided for by their contract, and the stay was granted.

Drawing upon the power of the court to order specific performance of signature of the DAA and imply a reasonable fee to enforce the DAB process, the court has provided clear support for the DAB process. If arbitration were to follow the DRB process, would an arbitration tribunal have granted the stay? Would the answer be different if the arbitration tribunal could retain jurisdiction to be called upon, if necessary, in the future?

Many of the arguments presented above were also presented and dissected in a similar case on 7 July 2014 (4A\_124/2014) by the Federal Supreme Court of Switzerland which, while upholding an award in an arbitration that skipped over the FIDIC DAB process due to the specific factual matrix therein, stated that the arbitral tribunal was incorrect in concluding that the use of the DAB was merely optional under the contract.

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## Roger Brown and Ron Finlay Receive Al Mathews Award of Excellence

Each year, the Dispute Resolution Board Foundation presents the prestigious Al Mathews Award to one or more DRBF members who have given exemplary service in advancing the use of the Dispute Resolution Board concepts and the DRBF. Nominations are solicited from DRBF membership and by the president of the Executive Board of Directors. The award is presented at the Gala Dinner hosted in conjunction with the DRBF Annual Meeting and Conference, held this year at the revolving restaurant atop the CN Tower in Toronto, Canada.

Congratulations to this year's recipients, Roger Brown and Ron Finlay.

**Roger Brown** has been a major contributor to the Dispute Resolution Board Foundation from the onset as a charter member and through his leadership on the DRBF Executive Board of Directors. He is a big supporter of the DRBF both within the US and on the international stage. He has served on Dispute Review Boards continuously for the past 16 years and currently is serving on seven active projects totaling over \$700 million dollars in volume.



Roger Brown receives the Al Mathews Award from Graham Easton, outgoing President of the DRBF Executive Board.

Roger has served in the engineering-construction industry for more than 45 years. In the roles of senior vice president and construction manager for two national contractors, he has overseen estimating, operational departments and field staff that constructed projects totaling in excess of \$1 billion. He currently provides consulting services to contractors and owners in preparing and defending construction claims and serves as an expert witness when claims enter litigation. In addition to serving as a Dispute Board member, he also serves as an arbitrator, mediator and neutral expert.

In recent years, Roger has formalized the DRBF's marketing initiatives, and led the creation of policies and internal procedures to stabilize the administration of the organization and set it up for future growth and expansion.

**Ron Finlay** has been an active member of the DRBF's Australasia executive group since its formation in 2003, serving as Secretary/Treasurer throughout. He has been responsible for all statutory and legal documents from the first Articles of Association to the recent establishment of DRBF Region 3. Despite a very busy professional life, he still finds time to continue these roles.

Ron has been a prime mover in convincing each of the major users of Dispute Boards in Australia of the benefits of DBs. He has been the driver of the recent adoption of the name "Dispute Avoidance Board (DAB)" by Roads & Maritime Services in the first instance, now being followed by Transport for New South Wales, National Broadband Network, and others.



Graham Easton gives the Al Mathews Award to 2014 recipient Ron Finlay.

Ron is an active member of the DRBF's Public Private Partnership (PPP) Task Force. He serves as an independent Chair of an Australian government group developing two multi-billion dollar PPP rail projects, and has been influential in convincing the authorities to implement DABs on those projects.

Ron has been an active contributor to all training programs in Region 3, and a contributor to the DRBF International Conferences in Sydney and Singapore. In addition, he has been and continues to be a member of a number of DRB/DABs. He is currently Chair of four DABs with values in the \$600m to \$1.7bn.

Roger Brown and Ron Finlay are recognized as worthy recipients of the Al Mathews Award and are considered a credit to the DRBF, which they have both served tirelessly over the years throughout the world.

Congratulations!

## Save the Date! DRBF 19th Annual Meeting & Conference

**October 1-3, 2015**  
**Marriott Union Square**  
**San Francisco, California**

The **DRBF 19th Annual Meeting and Conference** will integrate practical experience shared by users of the DRB process with in-depth analysis of this evolving dispute resolution process. With an emphasis on the DRB's unique role in dispute avoidance as well as resolution, conference delegates will explore ethical and legal issues, lessons learned from existing DRB programs, and future expansion of the process. Participants will also engage in interactive discussions that deepen understanding of the successful implementation and use of Dispute Boards worldwide.

The event kicks off with a full day of optional workshops on Oct. 1, followed by the two-day conference Oct. 2 & 3. The popular Al Mathews Awards dinner will be held on the evening of October 2.

**Mark your calendar  
and plan to join us!**

The distinguished list of past winners of the Al Mathews Award includes:

Al Mathews  
Robert Matyas  
Robert Smith  
Joe Sperry  
Jimmy Lairscey  
Carlos Ospina  
Pete Douglass  
Jim Donaldson  
Stephen Fox  
Gordon L. Jaynes  
John Nichols  
Peter H.J. Chapman  
William Baker  
Romano Allione  
Harold V. McKittrick  
Jack Feller  
Richard Appuhn  
Gwyn Owen  
Robert Rubin  
Graeme M. Peck  
James Brady  
Toshihiko Omoto  
Volker Jurowich

## Promoting Integrity: Can DRBs Assist in Preventing Fraud and Corruption?

By Wynand Roos

At the DRBF Annual Meeting and Conference in Toronto, Canada, senior members and stake holders from Europe, Africa, Asia, Australia, South America and North America attended. Although the Dispute Board process is well established and used in the construction industry, more and more industries outside construction have found benefits, and the process is expanding.

Three members of the DRBF, Wynand Roos, Eric Kerness and Andy Griffiths, presented a session on “Promoting Integrity: Can DRBs Assist in Preventing Fraud and Corruption?”

DRBs consist of individual, or more common, three-person panels of experts assisting clients and contractors to resolve differences before getting involved in arbitration or litigation. If requested a DRB can provide the parties with a non-binding recommendation for resolution.

The DRB panel, appointed by the parties to the contract themselves, are experts in the industry experienced in contract interpretation and the effect of scope changes, differing conditions, errors and omissions, and interference and delay. This results in timely and effective settlements with significant savings in costs. The process has been advanced over the past decade to focus more on prevention rather than cure.

Together the attendees to the conference have assisted with the amicable settlement of an estimated US\$20 billion worth of claims over the past year. In those cases where the parties requested a DRB hearing the parties accepted the DRB’s recommendation 98% of the time, avoiding long and expensive unpleasant arbitrations or litigation.

If DRBs are that successful in settling claims and avoiding disputes, the next natural question is if the process could play a role to avoid fraud and corruption? Wynand Roos defined fraud and corruption as “The draining of wealth from the coffers of the productive sector of the economy by unethical

and greedy operators.” It often occurs as a result of corrupt tender procedures, bid rigging, false claim evaluation, fraudulent measurement, bribery of officials etc. Bribery is rampant in many parts of the world and, because of heavy repercussions, whistle blowers are intimidated. Unfortunately senior officials in private and public sectors are often involved and governments are frequently conspirators.

Eric Kerness used a huge piling contract in New York under the US False Claims Act 31 USC 3729 as an example and Andy Griffiths reported on bid-rigging and collusion in the Lesotho Highlands Water Project in Southern Africa.

A recent PriceWaterhouseCoopers survey, “Perceptions of Foreign Bribery by Sector”, found that out of 19 sectors defined as fraudulent, construction was the worst, right at the bottom. The reason for construction being the worst sector could well be the fact that projects involve huge budgets from which millions can be scraped off with limited detectability.

Many institutions worldwide have declared their disapproval of fraud and corruption. This includes the World Bank, many of the world’s largest banks, institutions like the United Nations Convention Against Corruption (UNCAC), The Organization for Economic Co-operation and Development (OECD), PriceWaterhouse Coopers and the African Progress Panel, an entity created by UN Secretary General Kofi Annan.

Construction is the predominant contributor to the development of a country’s infrastructure and a principal stimulant for the creation of its wealth. Fraud and corruption in construction and infrastructure development has significant implications on business due to financial losses to clients and contractors. For the general population it has a major effect on the cost of living. It is widely passed downwards to virtually all sectors of the economy through the cost of energy, trans-



port, food, resource production and public services. It is indirectly financed by the end user and directly by governments. In the end the productive tax-payer is footing the bill and is being overcharged for maintaining his standard of living.

The subject raised intense interest and was well discussed, both during the session and the coffee break that followed.

In closing, Wynand suggested that “The issue of fraud and corruption can be addressed at conception of a project by including a condition in the tender contract, and even in a loan agreement, that holds individuals personally responsible for damages and costs when found to be involved in dishonesty.

The hanging of a sword over the head is often the only rule that makes most individuals act honestly.” He proposed that the DRBF Board of Directors consider the appointment of a taskforce to investigate the matter further for possible action.

The session can finally be concluded with a quote by Albert Einstein: “The world is a dangerous place to live in; not because of the people who are evil, but because of the people who don’t do anything about it.”

*Wynand Roos can be reached by email at [wynandroos@gmail.com](mailto:wynandroos@gmail.com)*

## DRBF 2015 Calendar of Events

January 6, 27 and February 24  
Caltrans Dispute Board Training - multiple locations in California

February 26 - 27  
Dispute Review Board Workshops - FDOT, Orlando, Florida

February 26 - 27  
East Africa Regional Conference - Nairobi, Kenya

May 21 - 23  
15th Annual International Conference - Genoa, Italy

June 5  
Northwest Regional Conference - Seattle, Washington

October 1 - 3  
19th Annual Meeting & Conference - San Francisco, California

**New details and events being added frequently  
visit [www.drb.org](http://www.drb.org) for details**

## Tanzania: Infrastructure Development and the Need to Institutionalise Resolution of Disputes in Construction Contracts

**Prof. Ninatubu M. Lema,**  
DRBF Country Representative for Tanzania

The pace at which infrastructure development has been taking place in Tanzania over the last ten years is unprecedented. Spending five years ago stood at US\$ 1.2 billion a year, which represented a substantial effort of almost 9% of gross domestic product (GDP). The public sector, the largest source of finance for infrastructure in Tanzania, accounted for 56% of total expenditure. The National Annual Budget for fiscal year 2014/15 indicated that the public sector expenditure on infrastructure alone grew from about 5% in 2010 to 8% of the GDP in 2014. Further, there are infrastructure projects worth about US\$ 19 billion on the drawing boards including a large port in Bagamoyo expected to cost about US\$ 10 billion. These are large figures for a country whose gross per capita income was only about US\$ 502 in 2014.

While these figures sound impressive in comparison to historical investment figures, the infrastructure growth target is still not achieved. Annual infrastructure spending of US\$ 2.9 billion (or about 12% of the GDP) is needed to catch up on infrastructure; that cost, relative to

GDP, is comparable to that incurred by China in recent years. Tanzania would need to invest US\$ 2.9 billion annually for a decade to catch up with the rest of the developing world in terms of infrastructure.

Public infrastructure investment focuses mainly on transport and communication, water, irrigation, housing and energy sectors. Parallel to these investment efforts, there has to be a sound system for delivering individual projects. Locally funded public projects continue to rely on a national procurement framework whereas donor funded projects either use the national procurement framework or specific donor framework based on bi- or multilateral arrangements.

The implementation of public infrastructure relies heavily on the services provided by the private sector (consultants and contractors) in line with the national procurement policy. The majority of public infrastructure projects are executed under the traditional contractual arrangement in which the works are designed by a consultant on behalf of the employer, and works constructed by the contractor procured by the employer. The procurement of public works is governed by the public procurement regulatory framework which has evolved over the last 15 years through a series of Public Procurement Acts (PPA) of 2001, 2004 and the latest one of 2011 using the traditional approach. Occasionally the works are designed by the employer, and supervision may also be carried out by the employer. However, all public works are implemented by a private sector contractor. There have been a handful of public



**PSPF and Tanzania Ports Authority Buildings,**  
on-going projects in Dar es Salaam, Tanzania

projects implemented through either a design–build approach mainly using the FIDIC Yellow Book customised to meet the requirements of the procurement legal framework.

Most works contracts based on the PPA 2011 provide for dispute resolution by a single adjudicator selected and agreed jointly between the parties before the contract is signed. The respective clause of the standard contract for works provides for reference to the adjudicator “if the Contractor believes that a decision taken by the Project Manager was either outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Project Manager’s decision and that the Adjudicator shall make his decision within 28 days. The respective contract provides for payment to the Adjudicator on an hourly rate. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator’s written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator’s decision will be final and binding.” It will be noted that the conditions of contract in use do not provide for the employer to make reference on any matter to the adjudicator. It is also explicitly stated that reference to the adjudicator can only be made when the project manager makes a wrong decision or acts outside his authority. The contract does not allow for the contractor to refer a matter to the adjudicator on a dispute that has been caused by the employer. This is seen as a major weakness in the resolution of disputes for projects implemented using the national procurement framework. It has to be stated here that there are no stan-



**Dar es Salaam Mtwara Natural Gas Pipeline** (project value US\$1.3 Billion) nears completion.

dard form of dispute resolution associated with the national forms of standard contracts. Individual adjudicators develop and implement procedures, which they consider fair, based on international practice.

In the last 5–8 years, in view of increased infrastructure development, there have been a number of infrastructure projects implemented using the FIDIC Red Book, 1999 edition and Yellow Book 1999 Edition, as well as the FIDIC MDB Harmonised Construction Contract, the first version of which was released in 2005. These standard conditions of contract have been used in relatively large public infrastructure projects most of which are donor funded. However, local public institutions are also adopting these FIDIC based standard forms of contract which they consider less risky than the national standard forms of contract. The use of FIDIC standard contracts has inevitably led to the use of more formal dispute resolution procedures using Dispute Adjudication Boards (DABs) although both employers and contractors (national and international alike) are still very ignorant of the entire process of resolving (or better still, avoiding) disputes using DABs. The establishment of a local chapter of



DRBF will go a long way in addressing local needs. While a formal group is not yet in place, a steering committee of five professionals (engineers and lawyers) has been established. This has attracted the attention of leading employers in the construction industry including the Tanzania National Roads Authority (TANROADS) and the National Housing Corporation (NHC). The main task of the group will be promotion and education.

**DRBF Country Representative  
Profile: Ninatubu Mbora Lema,  
PhD, MIET, PE, CE (T), FICE**

Prof. Lema is a civil engineer and a project and contract management expert specialising in infrastructure project procurement and management of contracts with local and international experience. He holds BSc. Eng (1st Class) Honours degree from the University of Dar es Salaam, MSc and PhD in engineering project management from Loughborough University in the United Kingdom. He has experience of more than 30 years in conducting studies and providing consultancy services in project appraisal, construction project planning, procurement, contract formulation and management, dispute resolution, project performance evaluation and corporate strategic planning. He is an adjudicator for a number of civil engineering projects in Tanzania. He has organised and conducted more than 30 short courses for construction and related-industry practitioners both in and outside Tanzania more that half of which are on construction project and contract

management. Prof. Lema is an author of more than 30 international and local technical publications, research and study reports. He has been lecturing at both undergraduate and postgraduate level on project and contract management that is inclusive of project procurement. In his capacity as professor at the University of Dar es Salaam Tanzania, Prof. Lema has supervised to successful completion over 30 Masters Degree dissertations, two Masters Theses and Four PhDs in Tanzania, Uganda, South Africa and Sweden, all of these in the area of project procurement and contract management. Prof. Lema is also a visiting professor at the University of Botswana teaching Project Risk Management at Postgraduate level. He has further co-authored an ANSTI sponsored forthcoming book titled: "Fundamentals of Civil Engineering Construction Management".

Prof. Lema is currently a procurement and contracts advisor/consultant to a number of major public projects including the USA Government financed Millennium Challenge Corporation projects. He has been an adjudicator in a number of public construction projects and has recently been appointed a member of Dispute Boards for two major road projects in Tanzania. Prof. Lema is a registered professional and consulting engineer with Professional Practicing License No. P-A0001 and Engineering Consulting License No. C-A118. He is the current Chairman of the Engineers Registration Board, Tanzania.

*Prof. Ninatubu Lema can be reached at [ninatubu@yahoo.co.uk](mailto:ninatubu@yahoo.co.uk)*

## DRBF Region 2 Board of Directors Call for Nominations



Region 2 of the DRBF has a seven person Board of Directors. At the upcoming International Conference in May, the Board will transition and the positions of President Elect and three general Board member positions will be vacant. The Elections Committee, consisting of Jim Perry, Chris Miers, and Andy Griffiths, invites all Region 2 members interested in serving on the Board to submit their candidacy.

- a) Each candidate must have a proposer and a seconder. Candidate, proposer and seconder must be members of the DRBF for at least 3 years.
- b) The candidate must be, or commit to become, a Professional Individual/Corporate member of the DRBF.
- c) A candidate for the position of President Elect (other than regular Board member) must provide, with his/her CV, demonstration of having participated actively in the organization of the DRBF (be it as Country Representative, committee member or other).
- d) All candidates must supply a statement to the members with a summary of their professional background, which will be distributed to the membership with the invitation to vote.
- e) All DRBF Region 2 members have a vote.
- f) Voting is done by e-mail, in advance of the Annual International Conference.
- g) The Elections Committee is the organizing body of the election.
- h) The President Elect serves for 3 years: President Elect, President, Past President.
- i) Terms start and end at the Annual International Conference, usually held in May each year.

Proposals may be sent to the DRBF General Manager Ann McGough by email at [amcough@drb.org](mailto:amcough@drb.org), fax to +1-206-878-3338, or letter:

Dispute Resolution Board Foundation  
Region 2 Board of Directors Nomination  
19550 International Blvd. So Suite 314  
Seattle, Washington 98188 USA

**Nominations must be made by 16 March 2015.  
Ballots will be distributed to all Region 2 members in April.**



## DRBF Country Representatives

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**Austria**

Marcus Theil

**Belgium**

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**Botswana**

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**Brazil**

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Contact details for  
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Representatives  
are available  
on the DRBF  
website:  
[www.drbf.org](http://www.drbf.org)



## DRBF 15th Annual International Conference

### Dispute Boards: The Continental Approach

May 21 - 23, 2015  
Genoa, Italy

The DRBF's annual International Conference attracts the top Dispute Board practitioners, employers, funding institutions, contractors, legal professionals and consultants all active in alternative dispute resolution. In 2015, the conference will be hosted for the second time in Italy, in the historic city of Genoa. Day one offers full-day interactive training, with an introductory level workshop for those new to the process, and an advanced level workshop for experienced Dispute Board practitioners. The two-day conference features engaging presentations and lively panel discussions about the latest developments and issues facing the alternative dispute resolution community worldwide, with an emphasis on the application of the Dispute Boards process under Civil Law jurisdictions.

- May 21 **Dispute Board Workshops** - A full-day introductory workshop or practical case study workshop for advanced practitioners. Earn CPD credits!
- May 22 & 23 **International Conference** - Presentations and panel discussions from funding organizations, employers, engineers, legal professionals, and DB practitioners, plus interactive discussion and networking.
- May 22 **Gala Dinner** - Enjoy socializing with conference delegates, speakers and guests at the popular Gala Dinner to be held at Via Garibaldi 5.

The workshop will be held at **The Bristol Palace Hotel** and the conference will be held at **Palazzo Ducale**, a historical building in the heart of Genoa. Details on travel and tourism, hotel options, and more are available on the conference website.

Visit [www.drb.org](http://www.drb.org) for details and registration

## Welcome to New DRBF Members

### Member Additions September - November 2014

**Do you know  
someone  
interested in  
joining  
the DRBF?**

Help us expand by sharing information with your colleagues. Complete membership information can be found on the DRBF web site ([www.drbf.org](http://www.drbf.org)) or contact the main office for details.

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## DRBF Forum

Dispute Resolution Board Foundation  
19550 International Blvd. So. Suite 314  
Seattle, WA 98188 USA

# DRBF International Conference: Gala Dinner

**Via Garibaldi 5 • Genoa**

Join conference delegates, speakers and guests on Friday, 22 May for an elegant four-course dinner featuring traditional Genovese cuisine and live music in the style of Genoa's famous violinist and composer, Niccolò Paganini. The venue is Via Garibaldi 5, a palace on Genoa's popular Via Garibaldi, a street lined with palaces dating back to 1550. Located in the central historic district, within walking distance of the host hotel and conference venue.

Dinner tickets are \$130 per person, inclusive of Italian wine, and guests have the option to select a menu of Meat, Fish or Vegetarian options, all emphasizing seasonal specialties. Cocktail attire.

